(4)

No. 91-676

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN W. GUMBY, SR. ET AL., PETITIONERS

v.

GENERAL PUBLIC UTILITIES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. 1447(d) bars a court of appeals from hearing an appeal of a certified question under 28 U.S.C. 1292(b), where the question arose in connection with a district court decision that a case should be remanded to state court on the ground that, although a federal statute authorized the removal, that statute was unconstitutional.

2. Whether Congress possessed the power under Article III of the Constitution to confer jurisdiction upon the federal district courts over "public liability actions" under the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2210(n)(2).

3. Whether a statute could constitutionally provide for the removal from state court to federal court of actions pending at the time the statute was enacted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A23-A138) is reported at 940 F.2d 832. The opinion of the district court (Pet. App. A139-A158) is reported at 735 F. Supp. 640.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1991. The petition for a writ of certiorari was filed on October 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Under the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (the 1988 Amendments), a defendant may remove any pending "pubilc liability action" arising out of or resulting from a nuclear incident to federal district court. 42 U.S.C. 2210(n)(2). These consolidated cases, originally brought in state courts in Pennsylvania, New Jersey, and Mississippi, are public liability actions, see 42 U.S.C. 2014(hh), and arise from alleged radiation leaks from the Three Mile Island Unit 2 (TMI) nuclear plant following the accident that occurred there on March 28, 1979. Plaintiffs in most of these actions brought claims for personal injury. In several actions, plaintiffs brought claims for loss of tourism business. The defendants are owners of TMI, persons responsible for its design, construction, and maintenance, suppliers of equipment used at TMI, and related companies.

1. In light of the strong federal interest in and pervasive regulation of the safety aspects of nuclear power, Congress enacted the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576, in 1957 (the Act) as an amendment to the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919. Through the Act, Congress sought to encourage private industry to participate in the commercial development of nuclear power by removing the deterrent of potentially unlimited liability that might result from a nuclear incident. Congress also acted to ensure that, in the event of such a nuclear incident, adequate funds would be available to compensate injured persons. See 42 U.S.C. 2012(i)

To accomplish these goals, the Act, as amended, establishes a system of private insurance, industry-

wide financial support, and government indemnity to satisfy "public liability" claims, defined in the Act as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. 2014(w). A "nuclear incident" is "any occurrence * * * causing * * * bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. 2014(q).

The Act requires each licensee of a commercial nuclear power reactor to secure and maintain a specified amount of insurance from private sources against public liability claims and to participate in an industry-wide pool that would provide financial support to pay public liability claims from other licensees. 42 U.S.C. 2210(a) and (b). The Act provides that the government will indemnify a licensee for public liability claims that exceed the amount of private insurance and industry-wide financial support, up to an aggregate limit on liability arising from a single incident. 42 U.S.C. 2210(c) and (e).

If aggregate liability exceeds that limit, the Act provides for mechanisms to obtain additional funding and to distribute the available funds equitably. Those mechanisms include requirements that the President formulate and Congress review under expedited procedures a plan to provide for more funds and to distribute available funds equitably. 42 U.S.C. 2210(e)(2) and (i). In addition, the Act provides that, where the aggregate liability limits may be exceeded, the district court in the district where the incident occurred shall limit payments to any single claimant and formulate a plan of compensation to distribute available funds equitably among

current claimants and future claimants whose injuries have not yet become manifest. 42 U.S.C. 2210(*o*).

In addition to the interrelated insurance, compensation, limitation of liability, and distribution provisions, the Act provides for the channeling of liability to operators of nuclear facilities and away from others who might bear such liability under ordinary tort principles. 42 U.S.C. 2014(t) and (w), 2210(a). See generally *Kiick* v. *Metropolitan Edison Co.*, 784 F.2d 490, 491 (3d Cir. 1986).

Finally, as amended by the Price-Anderson Amendments Act of 1988, the Act provides for federal jurisdiction over any "public liability action," 42 U.S.C. 2210(n)(2), defined as "any suit asserting public liability." 42 U.S.C. 2014(hh). The Amendments further provide for the choice of law in a public liability action: "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [42 U.S.C. 2210]." 42 U.S.C. 2014(hh). The Amendments also authorize the removal to federal court of any public liability action pending in a state court at the time of enactment of the Amendments, upon motion of either a defendant, the Nuclear Regulatory Commission (NRC), or the Secretary of Energy. See 42 U.S.C. 2210(n)(2). See generally Pet. App. A81 (summarizing incidents of public liability actions). The net result of the Act, as amended, is thus to assure uniformity, equity, and efficiency in the disposition of claims in suits already filed, as well as those filed in the future.

2. In 1984, prior to the 1988 Amendments, the Third Circuit held in *Stibitz* v. *General Public Utilities Corp.*, 746 F.2d 993 (1984), cert. denied, 469 U.S. 1214 (1985), that the Act did not provide fed-

eral subject matter jurisdiction over actions filed by plaintiffs arising from the accident at TMI.[1] Following the Third Circuit's remand, the district court returned the pending actions to the state courts either by remand or under applicable state law. Subsequently, other plaintiffs filed hundreds of additional actions in state courts arising from the same subject matter. Pet. App. A37-A39.

3. Following enactment of the 1988 Amendments on August 20, 1988, defendants in cases already pending filed timely motions to remove them to the United States District Court for the Middle District of Pennsylvania. Defendants also removed actions filed subsequently. Pet. App. A40. In November 1988, petitioners asked the district court to remand the actions to the state courts from which they had been removed. Petitioners based their claim, *inter alia*, on the assertion that, although Congress intended to confer federal jurisdiction over public liability actions, such actions exceeded the scope of federal question jurisdiction under Article III of the Constitution. Pet. App. A40. Defendants opposed the remand petitions, as did the United States, which had intervened pursuant to 28 U.S.C. 2403 because the proceedings drew into question the constitutionality of the 1988 Amendments. Pet. App. A40.

Agreeing with petitioners that the federal courts could not constitutionally exercise jurisdiction over

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[1] Prior to enactment of the 1988 Amendments, federal courts had original jurisdiction only over public liability actions "arising out of or resulting from an extraordinary nuclear occurrence." See 42 U.S.C. 2210(n)(2) (1982). See also 42 U.S.C. 2014(j) (defining extraordinary nuclear occurrence). Under the Act, the Nuclear Regulatory Commission has conclusively determined that the TMI accident was not an extraordinary nuclear occurrence. See *Stibitz* v. *General Public Utilities Corp.*, 746 F.2d at 996 n.3.

public liability actions and that the statute conferring federal jurisdiction over such actions was accordingly unconstitutional, the district court granted petitioners' motion to remand the actions to the state courts in which they had been filed. Pet. App. A139-A140. The district court certified its holding on the constitutionality of the statute for interlocutory appeal under 28 U.S.C. 1292(b). The United States and the defendants filed a petition for permission to take an interlocutory appeal of the district court's determination of that question, and the court of appeals granted such permission by order of July 12, 1990. Pet. App. A41.

4. The court of appeals reversed. Pet. App. A23-A138. Initially, the court determined that it was not barred from exercising appellate jurisdiction in this case by 28 U.S.C. 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The court noted that both the majority and dissenting opinions in *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), had stated that Congress intended in Section 1447(d) to bar appellate review of district court determinations as to whether removal was authorized by the controlling statute. 423 U.S. at 351; *id.* at 355 (Rehnquist, J., dissenting) (Congress "made the district courts the final arbiters of whether Congress intended that specific actions were to be tried in a federal court."). See Pet. App. A48, A61. The court concluded that Congress did not intend in Section 1447(d) to "make district courts the final arbiters of the constitutionality of federal statutes." Pet. App. A61. Accordingly, the court held that it "[could not] read section 1447(d) to bar appellate review of a district court's decision that the statute which pur-

ports to confer federal jurisdiction is constitutional, where the district court, recognizing the complexity and magnitude of the constitutional question before it, certifies that question for immediate appeal pursuant to 28 U.S.C. § 1292(b)." Pet. App. A64.[2]

Turning to the merits of petitioners' claim that the 1988 Amendments are unconstitutional, the court of appeals rejected petitioners' argument that those Amendments exceeded Congress's power to vest federal courts with jurisdiction over cases arising under the laws of the United States. The court first held that, in "explicitly providing that the 'substantive rules for decision' in public liability actions 'shall be derived from' the law of the state in which the nuclear incident occurred, * * * Congress expressed its intention that state law provides the content of and operates as federal law." Pet. App. A85. Analogizing the 1988 Amendments to numerous other statutes that provide for the use of state rules of decision in federal causes of action, Pet. App. A83-A87, the court found that federal law thus governs public liability actions and such actions come within the scope of Article III "arising under" jurisdiction. Pet. App. A87.

Alternatively, the court of appeals held that even if state law provides the rules of decision *ex proprio vigore* in public liability actions, "there are important federal questions to be resolved which are indispensable ingredients of the public liability action," Pet. App. A96, and such actions therefore come within the Article III grant of federal question jurisdiction. See

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[2] Accordingly, the court did not reach the question whether it would have been appropriate to exercise appellate jurisdiction under 28 U.S.C. 1291 or to issue a writ of mandamus under 28 U.S.C. 1651.

Pet. App. A87-A96. The court stated that "the duty the defendants owe the plaintiffs in tort is dictated by federal law," Pet. App. A91, and also noted that numerous other aspects of federal law are implicated in a public liability case, such as limitations on defenses, restriction of punitive damages, and choice of law. Pet. App. A91.

Finally, the court of appeals sustained the provisions in the 1988 Amendments that authorize application of the statute to cases pending at the time of enactment. The Court rejected petitioners' claims that this procedure violated constitutional principles of federalism, state sovereignty, due process, and equal protection. Pet. App. A96-A99.

In a concurring opinion (Pet. App. A100-A138), Judge Scirica upheld the constitutionality of the Amendments under a test that looks to the likelihood that substantive issues of federal law will arise in a particular class of cases and whether original jurisdiction, as opposed to removal or appellate jurisdiction, is important to the achievement of the purposes Congress sought to achieve. Pet. App. A117-A118, A137. In particular, Judge Scirica found it significant that Congress enacted provisions designed to ensure the equitable allocation of available funds among claimants when the Act's aggregate liability limits are exceeded, including the reservation of funds for claimants whose injuries do not become manifest until long after an accident. Judge Scirica noted that those provisions could achieve their goal only through exercise of original federal jurisdiction over public liability actions. Pet. App. A133-A136.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly determined that 28 U.S.C. 1447(d) did not bar it from exercising jurisdiction under 28 U.S.C. 1292(b). Although Section 1447(d) precludes further review of district court decisions concerning the application of jurisdictional statutes to particular cases, that Section should not be read to preclude all review of district court decisions holding that a statute authorizing removal is unconstitutional.[3]

a. Petitioners' primary contention is that the Third Circuit has created an exception to Section 1447(d) for cases in which a district court decides "a question of constitutional proportion," Pet. 11, and that that exception "has rendered meaningless the appellate review prohibition of § 1447(d)." Pet. 8. Petitioners, however, misstate the holding of the court of appeals. The court began its discussion with a precise formulation of the question presented: "whether Congress intended to insulate from review those remand orders which rest on the district court's finding that it lacks subject matter jurisdiction because the statute containing the grant of federal jurisdiction is, itself, unconstitutional." Pet. App.

[3] Independently, the court of appeals' decision to exercise jurisdiction is supported by the fact that the district court in this case stayed its order granting the motion to remand. The court thus never entered an order remanding these actions to the state courts from which they were removed and a prerequisite for application of 28 U.S.C. 1447(d) is therefore lacking in this case.

A42. The court's holding was similarly precise: Section 1447(d) does not bar "appellate review of a district court's decision that the statute which purports to confer federal jurisdiction is constitutional." Pet. App. A64. And even that holding was qualified: such review is permitted "where the district court, recognizing the complexity and magnitude of the constitutional question before it, certifies that question for immediate appeal pursuant to 28 U.S.C. § 1292(b)." *Ibid.*

In short, the court of appeals addressed a specific question concerning reviewability of district court decisions holding jurisdictional statutes unconstitutional and, even as to that question, limited its "narrow," Pet. App. A64, holding to cases involving interlocutory review of certified questions under 28 U.S.C. 1292(b). Petitioners advance no reason why the court of appeals' holding would be particularly difficult to apply in future cases or would interfere with the normal operation of Section 1447(d) to bar appellate review of remand orders.

Moreover, petitioners cite no prior case in which a district court has remanded a case to state court on the ground that the statute authorizing federal jurisdiction was unconstitutional. The court of appeals itself recognized that the facts giving rise to the reviewability issue in this case are "unique." Pet. App. A53.[4]

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[4] Petitioners assert (Pet. 10) that the decision of the court of appeals conflicts with decisions of other courts of appeals in three other cases, *Richards* v. *Federated Dep't Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987) (per curiam); *Federal Sav. & Loan Ins. Corp.* v. *Frumenti Development Corp.*, 857 F.2d 665 (9th Cir. 1988); *In re Bear River Drainage District*, 267 F.2d 849 (10th Cir. 1959). None of the three cases, however, raised

b. Contrary to petitioners' contention (Pet. 4), the decision below is also consistent with this Court's decision in *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976). In *Thermtron*, the Court explained that, under 28 U.S.C. 1447(c), a district court shall order remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction," [5] and that Section 1447(d) forbids review of remand orders issued pursuant to Section 1447(c). See 423 U.S. at 342-343. But the Court held that, where the district court has based its remand order not on its applica-

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or decided the question presented here. In *Richards*, the court did refer briefly to preclusion of review for "constitutional infirmities," 812 F.2d at 211, but the attempted appeal of the remand order in that case was based on one party's complaint that it had not had a fair opportunity to litigate the remand issue. *Ibid.* There is no indication that the district court based its remand order in *Richards* on a finding that a statute conferring federal jurisdiction was unconstitutional, and *Richards* accordingly casts no light on how the Fifth Circuit would have resolved this case. Similarly, *Frumenti* and *Bear River* both involved attempts to appeal remand orders pursuant to 28 U.S.C. 1292(b), but in both cases the remand was premised on a finding that federal jurisdiction was lacking under the controlling statute, not a holding that that statute was unconstitutional. See *Frumenti*, 857 F.2d at 666-667; *Bear River*, 267 F.2d at 850-851.

[5] In 1988, Congress amended 28 U.S.C. 1447(c), effective November 19, 1988, to provide that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Act of Nov. 19, 1988, Pub. L. No. 100-702, Tit. X, § 1016(c), 102 Stat. 4670. The amended version of Section 1447(c) was in effect at the time of the district court's March 16, 1990 order. The 1988 amendment does not reflect a substantive change that affects resolution of the issue in this case. See *Nasuti* v. *Scannell*, 906 F.2d 802, 806 n.7 (1st Cir. 1990).

tion of a jurisdictional statute under Section 1447 (c), but on some other factor, Section 1447(d) does not necessarily bar review of that order.

Nothing in *Thermtron* suggests that where the remand is based, as it is here, on a determination that "the controlling statute," 423 U.S. at 345, 351, is itself unconstitutional, Section 1447(d) precludes any review of that determination. As the dissenting opinion in *Thermtron* put it, in enacting Section 1447(d), Congress "made the district courts the final arbiters of *whether Congress intended* that specific actions were to be tried in a federal court." 423 U.S. at 355 (Rehnquist, J., dissenting) (emphasis added). Section 1447(d) insulates from any appellate review district court determinations whether and how a particular jurisdictional statute applies in a given case.

To adopt petitioner's position would be to extend the scope of unreviewable district court decisions dramatically. Because 28 U.S.C. 1447(d) makes remand orders "not reviewable on appeal or otherwise," it bars all review of an order within its scope, including review by the Supreme Court or by any other tribunal reviewing orders issued in the various state proceedings following the district court's remand. See *Metropolitan Cas. Ins. Co.* v. *Stevens*, 312 U.S. 563, 568 (1941). As a result, if a district court's ruling falls within Section 1447(d), it escapes appellate review altogether. The constitutional validity of a jurisdictional statute could thus depend on the district court—or even the particular district judge—before whom a given case is adjudicated. Although such disuniformity may be tolerable with respect to the application of jurisdictional statutes to given facts, the Third Circuit properly determined that Congress did not intend a similar, and unpredictable, variation in

whether its own jurisdictional enactments are deemed to be constitutional.[6]

2. The court of appeals' determination that Congress acted within its authority under Article III in enacting the jurisdictional provisions of the 1988 Amendments is also correct and does not conflict with any decision of this Court or of any other court of appeals.[7]

The decision below is entirely consistent with this Court's decisions in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480 (1983). In *Osborn*, the Court held that under Article III the federal courts "may receive * * * the power of construing every * * * law" that "the Legislature may constitutionally make," and that Congress may vest federal courts with jurisdiction over any case in which "the title or right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction." 22 U.S. (9 Wheat.) at 818, 822). In *Verlinden*, the Court explained that *Osborn* "reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction

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[6] Indeed, such disuniformity would be particulrly unfortunate with respect to the 1988 Price-Anderson Amendments, since uniform adjudication of claims arising from a nuclear accident was the primary basis for Congress's creation of the public liability action. See p. 17, *infra*.

[7] The only other court that has passed on the constitutionality of the 1988 Amendments employed essentially the same reasoning as did the Third Circuit and held the Amendments constitutional. See *O'Conner* v. *Commonwealth Edison Co.*, 770 F. Supp. 448 (C.D. Ill. 1991).

over any case or controversy that might call for the application of federal law." 461 U.S. at 492. See also *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting); *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 251-252 (1867).

The court of appeals' decision is faithful to this Court's pronouncements in *Osborn* and *Verlinden*. Federal jurisdiction in this case is proper both because a public liability action is itself a federal cause of action and because a public liability action necessarily includes numerous federal ingredients.

As the court of appeals noted, "[i]n explicitly providing that the 'substantive rules for decision' in public liability actions 'shall be derived from' the law of the state in which the nuclear incident occurred, * * * Congress expressed its intention that state law provides the content of and operates as federal law" in a public liability action. Pet. App. A85. As with numerous other federal causes of action that adopt state law in whole or in part, "the power of Congress to confer federal jurisdiction * * * and to give content to the federal law by adopting states rules of decision has never been questioned." [8] Pet. App. A86. Moreover, unlike other statutes that provide that state law is "to be the law of the United States," see 43 U.S.C. 1333(a)(2), the 1988 Amendments provide that the substantive rules of decision are merely to be "*derived from* the law of the State in which the

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[8] As the court of appeals noted, the same approach of adopting state rules of decision as federal law has been used, for example, in the Federal Deposit Insurance Act, 12 U.S.C. 1819; the Bankruptcy Reform Act of 1978, 11 U.S.C. 101-1330; 16 U.S.C. 457; the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*; and the Federal Tort Claims Act, 28 U.S.C. 1346(b). Pet. App. A84.

nuclear incident involved occurs," 42 U.S.C. 2014(hh) (emphasis added), thus indicating that the federal law governing public liability actions is distinct from the state rules of decision from which such federal law is "derived."

Even if Congress had made state law directly applicable to public liability actions under the 1988 Amendments, such actions would still contain sufficient federal ingredients to come within Article III "arising under" jurisdiction. Regardless of the precise role, if any, of state law in defining the standard of care in a public liability action, that standard must in each case at least be measured against federal safety standards; in the area of nuclear power, "safety regulation is the exclusive concern of the federal law." [9] *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); accord *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 208, 212-213 (1983). Moreover, public liability actions will involve numerous other federal ingredients. Choice of law is determined by the 1988 Amendments, not state law.[10] 42 U.S.C. 2014(hh). The limitations period and appropriate venue are governed by federal law. 42 U.S.C. 2210(n)(1) and (2). Federal law restricts the avail-

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[9] See Pet. App. A91 ("the duty the defendants owe the plaintiffs in tort is dictated by federal law"), A93 ("state remedies intact" but federal government retains "exclusive regulatory authority") (emphasis omitted).

[10] This factor could be important in a case like this, where individual claims were brought in the courts of three States, each of which may have different choice of law rules and may thus end up applying different rules of decision.

ability of punitive damages, 42 U.S.C. 2210(s),[11] limits certain defenses where there has been an extraordinary nuclear occurrence, 42 U.S.C. 2210(n)(1), establishes an upper limit of aggregate liability, 42 U.S.C. 2210(e), and provides for sharing of liability in part through the industry-wide rating and financial support system, 42 U.S.C. 2210(b). The Act governs who may ultimately be held liable in a public liability action by channeling all liability to licensees. 42 U.S.C. 2014(t) and (w), 2210(a). Thus, even if the cause of action were seen as arising under state law, many of the incidents of that cause of action will be determined by reference to these federal ingredients.

Finally, as Judge Scirica noted in his concurring opinion, the Act not only limits aggregate liability in the event of a nuclear incident, but also provides a detailed scheme for allocating funds in cases in which that aggregate liability limit threatens to be reached. That scheme provides for congressional, executive, and judicial action to distribute the limited available funds fairly among current claimants and among those whose injuries may not become manifest until a future date. See 42 U.S.C. 2210(e)(2), (i), and (*o*). It cannot be known in advance of litigation whether the aggregate liability limit will be reached with respect to a particular nuclear incident. The congressional plan to ensure fair allocation of available resources, and in particular the provisions requiring a single district court to be available to allocate funds fairly when the liability limits may be exceeded, 42 U.S.C. 2210(*o*), can only be accomplished

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[11] The question whether a given form of relief constitutes "punitive damages" is itself a federal question. *Molzof* v. *United States*, No. 90-838 (Jan. 14, 1992), slip op. 4.

if a federal forum is available for the adjudication of all claims arising from a single incident.

As the House Committee on Energy and Commerce explained,

> These measures stem from the desire of Congress for equitable and uniform treatment of victims of a nuclear accident and the need to coordinate all phases of litigation that could result from a large nuclear accident. Moreover, consolidation of claims in a single court would be essential for the orderly distribution of the limited funds available and to assure reservation of sufficient funds for victims whose injuries may not become manifest until long after the accident.

H.R. Rep. No. 104, 100th Cong., 1st Sess. Pt. 1, at 18 (1987). Plaintiffs do not and cannot dispute that Congress, acting pursuant to its Commerce Clause and other powers, may legitimately pursue the goal of closely regulating the liability that may arise from a nuclear incident. Having pursued that goal by enacting the Price-Anderson Act and the 1988 Amendments, Congress may under Article III entrust litigation relating to such incidents to the federal courts.

3. The court of appeals correctly rejected (Pet. App. A96-A99) petitioners' miscellaneous claims that the 1988 Amendments unconstitutionally interfere with state sovereignty and principles of federalism by applying the newly enacted statute to cases pending at the time the Amendments were enacted.[12] As

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[12] The district court in *O'Conner* v. *Commonwealth Edison Co.*, 770 F. Supp. at 456-457, the only other court to discuss the constitutionality of applying the 1988 Amendments to pending cases, reached the same conclusion as did the Third Circuit here.

the court of appeals observed, petitioners' "arguments with respect to these issues were skeletal." Pet. App. A96. Congress is, of course, empowered to specify that a statute shall apply to pending cases. *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989). Petitioners' arguments rest upon the proposition that Congress may not deprive state courts of jurisdiction over actions once they have been filed in state court. This Court has repeatedly rejected that proposition, which, if applied consistently, would simply invalidate all removal statutes. See *Tennessee* v. *Davis*, 100 U.S. 257, 267 (1880); *Railway Co.* v. *Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1872). Petitioners offer no reason why those precedents should be re-examined at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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